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IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1981

STATE OF WASHINGTON, et al.,

Appellants,

v.

SEATTLE SCHOOL DISTRICT No. 1, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
I. Inititative 350 Does Not Embody a Racial Classification Nor Was It Adopted For A Discriminatory Purpose	6
A. The Relationship Between The "Classification" Issue And The "Purpose" Issue	6
B. The Fact That The Initiative Was Prompted By The Seattle Plan, Does Not Show A Racially Discriminatory Purpose.	8
C. If The State Cannot Limit Extra-neighborhood Student Assignments, Who Can? The Issues of State Control Versus Local Control and State Intrusion Into Local Affairs	10
II. The Initiative Does Not Resegregate Any School District In The State of Washington	13
III. The "Overbreadth" Issue	17
CONCLUSION	18

TABLE OF CASES

Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 7, 9, 19

Brown v. Board of Education, 347 U.S. 483 (1954) 6, 7

Dayton Board of Education v. Brinkman, 433 U.S. 406 (1977) 11

Hunter v. Erickson, 393 U.S. 385 (1969) 6, 7, 8, 12, 13, 19

James v. Valtierra, 402 U.S. 137 (1971) 8, 9

Mandatory Bussing v. Palmason, 80 Wn.2d 445, 495 P.2d 657 (1972) 12

Pasadena Board of Education v. Spangler, 427 U.S. 424 (1976) 15

Personnel Administrator v. Feeney, 442 U.S. 256 (1979) 7, 8, 9, 19

Swann v. Board of Education, 402 U.S. 1 (1971) 15

Washington v. Davis, 426 U.S. 229 (1976) 7, 9, 10, 19

Washington Statutes — *Page*

Chapter 340, Laws of 1981, §§ 87-91 13

Initiative Measure No. 350 (Chapter 28A.26 RCW) ..... Passim

Washington Revised Code § 28A.58.754 13

United States Constitution

Fourteenth Amendment (Equal Protection Clause) 3, 11, 17

Other Texts and Authorities

Bell, *Book Review*, 92 H.L.R. 1826 (1979) 5

Report No. 81-6, *The Effect Of The Seattle Plan For School Desegregation On Achievement Test Scores* .. 5

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INTRODUCTION

This case involves a clash between school officials and the voters of the State of Washington on a critical issue of social policy.[1] But contrary to appellees contention, it does not involve as well a clash between the voters and the constitutional rights of its minority children, as should become clear to this Court.

We do not propose to show that the policy adopted by the voters in Initiative 350, which overrode that adopted by the school officials, was the wisest or even the preferable policy. Just as one can always argue whether the

[1]We use the broader term "social" rather than "educational" policy for the clash involves, as we shall see, fundamentally different views as to the proper role of an educational system.

voters' choice of a president, governor, or legislator is the preferable choice, so too here. Whether the voters' choice was the best or not is probably unresolvable. The relevant question is whether it was constitutionally theirs to make in the first place.

The policy question and the constitutional question, however, cannot be completely divorced. Indeed, an examination of the relationship between the two raises the principal issues upon which we focus in this reply, as we take up the various points made by the appellee school districts.

First, we examine the relationship between the issue of improper statutory classification (albeit covert as appellees now admit) and the issue of improper purpose, and ask in light of that examination: Are the two issues really separate? Is not the charge of an improper *covert* classification, analytically, the same as the charge of improper purpose? And more importantly, does not the *overt* classification which the Initiative actually makes belie the charge of improper purpose?

Admittedly, Initiative 350 was prompted by, and in that sense aimed at, the Seattle Plan. But what, in the voters' minds, was *wrong* with the Seattle Plan, as shown by the Initiative itself, and particularly by the classification that it makes? What *feature* of the Seattle Plan was it that prompted the Initiative? These questions bring the classification issue and the issue of improper purpose into focus and will show that they are not really distinct. In turn, they will provide no basis for invalidating the Initiative.

This first line of inquiry leads to the second: In what precise sense is the policy decision adopted through the Initiative "race conscious"? After all, the Initiative was proposed in response to another decision that was unquestionably "race conscious"; *i.e.*, the adoption of the Seattle Plan itself and the departure from the traditional neighborhood school assignment policy which it embodied. Does this unavoidable element of "race consciousness" in the adoption of the Initiative make it constitutionally impermissible for the voters?

Next, we ask: If the voters of the State cannot

override the policy decision made by the school officials involved in this litigation—and especially that made by the Seattle School District officials—is there *anyone* who can override that decision? Can those very same officials do so? And if they can, why cannot the voters themselves? By what constitutional analysis is this power to override given to the one group, and not to the other? This question is particularly important where, as here, the policy being rescinded was not itself constitutionally required in the first place.

There is another facet to this problem, best illustrated by the claim of Seattle School District. That claim, in essence, is that Initiative 350 is unconstitutional because it prevents the District from attaining the precise racial balance prescribed by the *specific percentages* established for Seattle. But what is it in the Fourteenth Amendment's Equal Protection Clause which provides that protection to these percentages? If they (or any percentages) are so protected, can the voters change them so as to require a lesser level of racial balance? More importantly, can even Seattle School District change them? Is the Fourteenth Amendment in effect a legal ratchet which allows changes in the percentages only in one direction, if by the voters, but in both directions if by the District itself? We will explore these questions as well.

Lastly we again examine the "overbreadth" issue to show that, viewed in its proper perspective (*i.e.*, from the perspective of the constitutional and statutory rights of school children) it is really a "non-issue," the resolution of which will only determine a constitutionally insignificant procedural issue; *i.e.*, who might bring the next possible round of litigation.

Before taking up these points, however, one question should be addressed at the outset: If the Initiative is upheld, what will be the effect on the education of minority children, so far as the record tells us?

For minority children in the Pasco School District,

the result will be that they are no longer bussed to the other end of the school district and are instead free to attend the two or three schools closest to their own neighborhood. At the same time *majority* children in Pasco, if the district determines to maintain *its* precise percentages, will, for the first time be required to ride the bus to the next nearest school. (See, App. Br. 16, and JA 53). Whether they would receive a better education there than that which they are receiving now is not known.

For minority children in the Tacoma School District, the result would be no change whatsoever. (See, App. Br. 17-18).

For minority children in the Seattle School District, the answer depends upon the decisions which the District and the students (and their parents) would make.

How close Seattle might come to its own definition within the limitations of the Initiative is impossible to determine, because the answer principally depends upon two factors: The success or lack thereof for the voluntary programs, and the District's own policies regarding school closures. Because of its declining enrollment, school closures are economically necessary, though politically difficult. (*Cf.*, FF 3.9).[2] Closing schools which would not meet the District's criteria for racial imbalance would obviously bring the District much closer than would closing those which do meet them.[3]

So much for the numbers—or lack thereof. What does all this mean in terms of the quality of education which would be received by minority students in Seattle if the Initiative were upheld?

No one really knows. But an indication may be found

[2]This stems, of course, from parents' strong belief in neighborhood schools, and can hardly be gainsayed. It comes from minority as well as majority parents. However, when some schools *must* be closed nevertheless, because of declining enrollments, the only question is *which* schools must be closed. And that choice is the District's, and will effect the degree of racial balancing.

[3]All of this is dependent upon one critical factor. Seattle presupposes that they are under an affirmative duty to meet that specific level of balance. We submit they were not, and are not now. That, of course, is the core question the Court must answer. (See pp. 13-17, *infra*)

in a report referred to, though not identified, in appellees' brief.[4] In August of last year, Seattle issued Report No. 81-6, entitled "The Effect of the Seattle Plan for School Desegregation[5] on Achievement Test Scores." The reason for the study covered in the report is states as follows:

> "One of the frequently asked questions is, 'What effect has desegregation had on student achievement?' *It should be remembered that the goal of the Seattle Plan was to eliminate racial imbalance; not to raise achievement levels.* Nevertheless, some concern has been expressed that desegregation might somehow *lower* achievement levels for some students. The report addresses this concern." (Emphasis supplied.)

The report concludes:

> "*The purpose of the Seattle Plan was to reduce racial imbalance in the schools. Achievement of that goal has demonstrated the Plan's success. Any effect of the Plan on achievement test scores is irrelevant to evaluation of the Seattle Plan itself.*" (Emphasis supplied)

This is hardly a ringing endorsement for the Seattle Plan as a means of attaining higher achievement levels, and falls considerably short of showing a significant correlation between levels of racial balance and levels of educational achievement.

But even more importantly, the report shows that the Seattle Plan embodies a particular educational—or rather social—policy: Racial balance must be achieved, even when not constitutionally required, simply as a matter of good social policy, completely independent of the actual results on educational achievement.[6]

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[4]See, SD Br., 14, note 15: "Test scores in Seattle have slightly improved." This 1981 report would appear to be the source for that statment.

[5]This term itself assumes a legal conclusion which is at the heart of this litigation. See discussion pp. 13-17, *infra*.

[6]One is reminded of Dean Derrick Bell's comment on Gary Orfield, who was one of the appellees' witnesses in this case: "But school integration for liberal campaigners like Orfield is too important to confuse with education." See, Bell, Book Review, 92 H.L.R. 1826, 1836 (1979) reviewing Orfield's "Must We Bus?"

This may indeed be sound social policy. The question, however, is whether it is to be embedded in the requirements of the Fourteenth Amendment.

The Seattle Plan, we should add, does not reject the values inherent in a neighborhood school policy; nor does the Initiative reject the values inherent in increased racial balance. The critical difference lies rather in the different weights each assigns to these competing values, and in the accommodation that they strike.

Thus, the Initiative allows mandatory assignments to the *next nearest* school, for the purpose of achieving racial balance, or for any other purpose. Similarly, decisions as to which schools should be closed and where new schools should be located will have a substantial impact upon the level of racial balance; and the Initiative does not control those decisions in any way. So too the Seattle Plan mandatorily assigns not just individual students, but "entire neighborhoods of students" away from their nearest or next nearest school. (FF 6.11, J.S. A-17) And as we have seen, one of the justifications for such mandatory assignments is the opposition to school closures from neighborhood groups which purportedly make school closures an impracticable tool for achieving racial balance. (See, FF3.9.)

We now turn to the legal issues.

I. INITIATIVE 350 DOES NOT EMBODY A RACIAL CLASSIFICATION NOR WAS IT ADOPTED FOR A DISCRIMINATORY PURPOSE.

A. *The Relationship Between the "Classification" Issue and the "Purpose" Issue.*

The reason for the school districts' efforts—so far successful—to establish that the Initiative embodies a racial classification is readily understandable. Once such a classification is found it is invariably fatal to the law or other governmental decision under attack. See, *e.g.*, *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Hunter v.*

Erickson, 393 U.S. 385 (1969). In contrast, attacks grounded on a charge of racially discriminatory purpose have, in recent cases, failed. See, *e.g.*, *Washington v. Davis*, 426 U.S. 229 (1976) and *Arlington Heights v. Metroplitan Housing Development Corp.*, 429 U.S. 252 (1977), *cf.*, *Personnel Administrator v. Feeney*, 442 US. 256 (1979).

Certain portions of the school districts' brief, however, raise the question: Are the two arguments really distinct? In arguing that the Initiative creates a racial classification, they state: "It [the Initiative] is race-conscious in its history and race-related in its *purpose* and *effect*." (SD Br. 18, emphasis supplied.) The Initiative's classification, it is argued, is "covert" (SD Br. 21), and must be judged on the basis of its "objective." (SD Br. 21). Similarly, under this same argument, the school districts emphasize "the potential for corruptive influence of prejudice." (SD Br. 24).

This suggests that the school districts' "classification" argument and its "purpose" argument are not really all that distinct—and indeed they are not. The search for a "covert" classification is really the search for an improper purpose.

We suggest that the focus instead be upon a somewhat different distinction which, though not altogether tidy, may be analytically more useful. That distinction would be between (1) governmental decisions which are *per se* violative of the Fourteenth Amendment regardless of motive and (2) those which are constitutionally permissible, in and of themselves, but may be invalidated because of the reasons or motives behind their adoption. *Brown v. Board of Education* and *Hunter v. Erickson* would illustrate the first category of cases; and *Washington v. Davis, Arlington Heights*, and *Feeney* the second.

When we say that the Initiative does not embody a racial classification we are saying only that it is a governmental decision which falls into the second category and not the first. More specifically, we are saying that a governmental decision to prohibit mandatory assignments

beyond the next nearest school except for reasons related to the individual needs of the student is, in and of itself, perfectly permissible. It is not off limites to the government's decision-making process. It is, in this respect, no different from a decision to give a veterans' preference in employment. (*cf., Feeney*) or to require minimum literacy requirements for applicants to a police force. (*Davis*). But just as in *Feeney* and *Davis*, so too here a racially discriminatory purpose may invalidate that decision. And whether one couches the legal result in those terms, or in terms of a "covert" classification, is really beside the point.

This is perhaps best illustrated by comparing *Hunter v. Erickson, supra*, with *James v. Valtierra*, 402 U.S. 137 (1971). In *Valtierra*, it will be recalled, the lower court had invalidated, on the basis of *Hunter*, an amendment to the California constitution requiring local voter approval for any low-rent public housing project. In reversing, this Court stated: "The present case could be affirmed only by extending Hunter, and this we decline to do." 402 U.S. at 141.

The Court did not engage in a search for a "covert" classification or attempt to determine whether the classification actually made by the amendment, though nonracial in "form," was racial in "substance." (*Cf.*, SD Br. 21). Rather, it went directly to the question of whether the amendment was "aimed at a racial minority," *i.e.*, the question of discriminatory purpose.

The Court should take the identical approach here.

B. *The Fact that the Initiative was Prompted by the Seattle Plan Does not Show a Racially Discriminatory Purpose.*

The school districts' principal contention as to racially discriminatory purpose, however phrased, really sifts down to a single assertion: The Initiative was intended to impede the Seattle Plan, and any other plan which relied upon mandatory extra-neighborhood student assignments to achieve racial balance. Indeed, this effect

on the Seattle Plan was the basis for the District Court's finding that a discriminatory purpose existed. (See, J.S. A-24).

But this overlooks the critical question: Is the objectionable feature of such plans that they achieve greater racial balance than would exist without them? Or is it that they mandatorily assign students outside their neighborhoods, without any justification in terms of the specific needs of specific students?

The classification established by the Initiative itself provides a large part of the answer. It shows that the objectionable feature was not the former but the latter. This is shown by the fact that the scope of the Initiative is not limited to plans for attaining racial balance, such as the Seattle Plan, but covers *all* extra-neighborhood mandatory assignments, for whatever reason, unless they can be justified in terms of specific needs of specific students.[7]

The Initiative no more evidences an intent to discriminate than did the constitutional amendment involved in *Valtierra*, the test for police force applicants involved in *Davis*, the zoning decision in *Arlington Heights*, or the veterans' preference provision involved in *Feeney*. And the burden of showing such an intent remains with the appellee school districts, just as it remained with the plaintiffs in those four cases. They simply have not met that burden.

In attempting to meet that burden, the school districts also face a major factual hurdle: In the campaign for Initiative 350 the Initiative's sponsors made no appeals to racial bias, and in fact deliberately took steps to avoid race becoming an issue. (FF 7.27, 7.29, J.S. A-23). Indeed, as we earlier pointed out, advertising and public relations witnesses called by both sides gave unrebutted substantive testimony that a statewide campaign in favor of a ballot proposition would *lose* support in Washington if designed

[7]Compare FF 8.3 and 8.8 (JS A-24) and the District Court's use of the qualifiers "most," "major" (FF 8.3) and "almost all" (FF 8.8). That bussing of students for purposes other than racial balance was taking place in Washington, which *would be precluded* by the Initiative, was demonstrated in the record, as the District Court acknowledged. See JS 18, St. Br. 10, N. 6.

to appeal to segregative and racist attitudes. (Tr., pp. 496-98, 505-06, 509-11, 538; JA 21, 26; Ex. 2)

This does not mean that some of the voters were not influenced by racial bias. It does show, however, that such bias was in no way a decisive factor in the Initiative's success.[8] Indeed, the converse *is* shown; lack of bias was the decisive factor. And it further shows what should be obvious from the Initiative itself, and from any balanced view of the record. To the extent that the voters considered race at all, they decided that any benefits from increased racial balance stemming from extra-neighborhood school assignments were outweighed by the benefits of a policy allowing the choice of one's neighborhood school.

The school districts simply suggest that the Initiative is nevertheless invalid because it was "race conscious." Certainly, because it was developed as a response to the Seattle Plan *which was itself "race conscious"* a corresponding element of race-consciousness was inevitable. But this factor should no more invalidate the Initiative than it should invalidate the Seattle Plan itself. The critical question is the role which this race-consciousness played in the decision-making process. Did it lead to the adoption of the Initiative for a discriminatory purpose? As we have seen, it did not. And the school districts' efforts to equate race consciousness with discriminatory purpose only confuse the issues, by substituting "buzz" words for legal analysis.

C. *If the State Cannot Limit Extra-neighborhood Student Assignments, who can? The Issues of State Control Versus Local Control and State Intrusion into Local Affairs.*

The issue of discriminatory purpose is next examined from another aspect. Under the opinion of the Court of Appeals, Seattle could completely dismantle its own plan, and revert back to its prior policy of a neighborhood school

[8]As Justice Stevens has reminded us: "A law conscripting clerics should not be invalidated because an atheist voted for it." *Washington v. Davis*, 426 U.S. at 253.

system, at least absent any prior de jure segregation. J.S. App. B-10. And on this point, the Court of Appeals was correctly following this Court's opinion in *Dayton v. Board of Education v. Brinkman*, 433 U.S. 406 at 414 (1977).

But if the arguments of the school districts on the issue of discriminatory purpose are correct, then the Court of Appeals (along with this Court in *Dayton*) was incorrect, and Seattle would be forever precluded from dismantling its plan, even though it had no constitutional obligation to adopt it in the first place. For if Initiative 350 was discriminatory in purpose *only* because it embodied a decision to undo the racial balance brought about by the Seattle Plan, the same decision, with the same effect, must also be discriminatory when made by the school board members themselves, rather than the voters.

Similarly, if the Initiative is unconstitutional because it deprives minority groups of educational benefits stemming from increased racial balance brought about by the Plan, then it should also be unconstitutional for the school board to do the same thing. If it is discriminatory for the voters to change the accommodation between neighborhood schools and racial balance struck by the Seattle Plan by assigning more importance to neighborhood schools, it should be discriminatory for the school board to do so as well. The school districts' arguments as to discriminatory purpose, in short, prove too much. They permanently would lock in *all* efforts to achieve racial balance even where not constitutionally required in the first place. This Court, however, has never given such an effect to the Fourteenth Amendment and, as pointed out by the Court of Appeals, has indicated in *Dayton* that it has no such effect.

And quite wisely so, in our view. If efforts to achieve greater racial balance were constitutionally irreversible, that would be a great disincentive to undertake such efforts in the first place.[9]

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[9]Not only would efforts to achieve racial balance in schools be impeded, but governmental efforts to promote those programs generally described as "affirmative action" would logically be irreversible as well, and for that reason similarly impeded.

There is, to be sure, a further argument offered by the school districts which does not have this boomerang effect. For it involves a theory which would, if accepted, invalidate Initiative 350 without also prohibiting Seattle itself from adopting the same policy as that embodied in the Initiative. The argument is that the Initiative skews the political process in the same manner as it was skewed in *Hunter*. But let us see if this parallel really exists.

The constitutional violation in *Hunter* was not that the Akron open housing ordinance was repealed. Clearly the Akron city council could have repealed it without violating the Fourteenth Amendment, and so could the voters themselves, through the referendum process (393 U.S. 390, note 5). The constitutional violation rather involved the procedures for restoring that ordinance. Those procedures established a "gauntlet," i.e., the necessity of an automatic referendum to the voters, which no other ordinances relating to housing—and indeed, no other types of ordinances at all—had to run. (393 U.S. at 390, 391)

The school districts contend that the Initiative has created a similar gauntlet which must be run only by the proponents of extra-neighborhood mandatory assignments for racial balance.

We have already touched upon one reason why it does not. The proponents of extra-neighborhood mandatory assignments for several reasons must now, under the Initiative, convince the legislature or the voters of the merits of their cause, unless the reason can be found as an exception within the Initiative justified in terms of specific needs of specific students.

The parallel fails for two additional reasons. The opponents of the Seattle Plan simply did not have available to them a local referendum procedure similar to that available in Akron. The only choice they had in presenting their case to the voters was the choice they actually made—a statewide initiative.[10] They changed the locus of the decision-making process from the local to the state level because State law made that their only choice.

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[10]*Citizens Against Mandatory Bussing v. Palmason*, 80 Wn.2d 445 at 449, 495 P.2d 657 (1972).

Consider the supposed parallel next from the point of view of the proponents of extra-neighborhood mandatory assignments, rather than that of the opponents. It is not just minority groups that must make their case on the state level in order to bring about what they perceive to be educational improvements. (See generally, State Br. 21, 22; U.S. Br. 21-24.) If any group, minority or not, wishes major curriculum changes, they must change state law. See Wash. Rev. Code § 28A.58.754. If they want lower ratios of students to classroom teachers, or if they believe those teachers are inadequate because they are underpaid, they must look to the legislature. (See §§ 87-91, chapter 340, Laws of 1981, establishing funding levels in terms of salary levels and student-staff ratios.) Likewise, they must look to the legislature if they wish to assure more hours of instruction for their children.

What we are saying, quite simply, is that because of the State's constitutional "paramount duty" in the field of education, broad state control over the decisions of local school boards is the norm, not the exception. And for this reason, as well, the parallel with the situation in *Hunter v. Erickson* does not exist.

II. ***The Initiative Does Not "Resegregate" Any school District in the State of Washington.***

At page 2 of the Brief of Appellees, the school districts make the following statement which they characterize as part of the "historical background" of this case:

> "The Seattle, Tacoma, and Pasco * * * districts have determined that racial *desegregation* is an important educational goal. The overall education of students * * * suffers when schools are *segregated*, * * * The greater the *racial imbalance*, the greater the impairment. * * * Since the early 1960's, these public school districts have taken steps to reduce school *segregation*. * * * "Because the antibusing statute in question arose mainly in opposition to effective *desegregation* in Seattle, events there must be recited in some detail." (Emphasis added.)

The underscoring in this excerpt emphasizes a critical semantical ambiguity which the districts have quite deliberately—and so far, at least, successfully—sought to interject into this case since the very outset. The words "segregation" and "racial imbalance," one will note, are used interchangeably (as they have been throughout this litigation).

The inference to be drawn from repeated use of such words as "segregation," "segregated" and "desegregation," of course, is that *de jure* segregation (*i.e.*, some form of dual school system, some officially imposed or sanctioned separation of the races) exists in all three districts *compelling* remedial action (*i.e.*, steps taken pursuant to a constitutional duty) which is, according to appellees, frustrated by Initiative 350.

As much as these school districts may imply that Initiative 350 interferes with the performance of some constitutional duty to remedy the effects of a dual school system, however, the instant case does not present that issue at all. There has been no showing that there is now or ever has been "segregation" (in the sense of *de jure* segregation) in any of these districts or, for that matter, any other school districts in Washington. The only showing so far made is that the traditional and natural distribution of students in Washington's 300 school districts results in a condition in three of those districts which, according to differing administrative formulae developed by those districts, could be described as racial "imbalance" in their respective student populations.

The districts have strived mightly to insure that this particular element of confusion remains ingrained in any analysis of the pivotal issue of this case, for the policy underpinnings of their position depend upon its presence. Their insistence upon the presence of some affirmative constitutional duty on the part of individual school board members, for example, is predicated on equation of the terms "racial imbalance" and "*de jure* segregation." And the validity of their contention that Initiative 350, if implemented in Seattle, will somehow accomplish "resegregation" of Seattle's schools depends absolutely on

some constitutional sanctity being accorded that district's definition of "racial imbalance" in its schools. Logically, their argument in this regard depends on some perfect equation of their own criterion for determining racial imbalance in student distribution with the term "segregation." To this extent, then, it is transparent that the position taken by the districts before this Court posits the existence of a constitutional standard of racial balance, a proposition specifically rejected by this Court in *Swann v. Board of Education*, 402 U.S. 1 (1971) and *Pasadena Board of Education v. Spangler*, 427 U.S. 424 (1976). In *Spangler* this Court noted at 427 U.S. 434 that:

> "The District Court's interpretation * * * appears to contemplate the 'substantive constitutional right [to a] particular degree of racial balance or mixing' which * * * *Swann* expressly disapproved."

If for no other reason, the weakness of their analysis is apparent from the fact that these formulae are eternally subject to change.

But there are other reasons. Even if the criteria for determining when Seattle's schools suffer from "racial imbalance,"[11] or when Tacoma's school children suffer from "racial isolation"[12] or when Pasco's schools are

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[11]The Seattle School Board currently defines "racial imbalance" as the condition which exists when:

> "* * * the combined minority enrollment in a school exceeds the district-wide combined minority average by 20 percentage points, provided that the single minority enrollment (as defined by current federal categories) of no school will exceed 50 percent of the student body."

FF 6.9. Under this definition, of course, a school where the relative school enrollment is one-third black, one-third Asian and one-third white majority, would nevertheless be "racially imbalanced" since the minority population would exceed the district-wide combined minority average by more than 20 percent. If, on the other hand, the combined minority population in the District some day exceeds 80 percent then, without a change in Seattle's definition, a school which is one-third black, one-third Asian, one-third Hispanic, but which is not attended by a single white student, will nevertheless be "racially balanced," and minority students in that school will not be "isolated" from white students.

[12]The District Court found that the Tacoma School District defined racially imbalanced schools as those which had a combined minority enrollment of 50 percent or more or a single minority of 40 percent or

"segregated"[13] were not subject to change by the several districts which have chosen to adopt them, they simply do not rise to the dignity of constitutional standards. They are too flawed.

The Seattle School District's own expert witnesses testified, for example, that if the District had, instead, required that no school within the district could have a majority enrollment of less than 18 percent, then Seattle schools could all have been racially balanced (within the constraints of that criteria) under Initiative 350.[14] In Pasco, a school which is perfectly "balanced" on a one-to-one basis (*i.e.*, 50 percent minority students and 50 percent majority students) becomes "segregated" if one more minority student is added to the student population.

The definition of "racial isolation" adopted by the State Board of Education and the State Human Rights Commission leads to absurd results when applied in other major metropolitan areas throughout the State of Washington. In Spokane, for instance, where the combined minority population atthe time of trial was 7.05 percent, a student in a school which has a combined minority population in excess of 27.05 percent would suffer "racial isolation." Vancouver is an even more dramatic example of these senseless results. According to that criterion, a minority student in a Vancouver school which was fully 75 percent majority would, nevertheless, be "racially isolated."

The point is this. There are various definitions of "racial balance," "racial isolation," etc., in place in Wash-

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more. FF 5.1. This is a correct finding, but the situation in Tacoma changed during the period immediately leading up to this litigation. The Tacoma School District's definition of a "de facto segregated" school is determined by reference to the State Board of Education's definition of "racial isolation." When, in turn, the State Board changed its definition of "racial isolation," the Tacoma School District immediately found itself with more "segregated" schools than it had previously (although no change in school enrollment had occurred). (Tr. 386-88).

[13]The Pasco School District has never developed any working definition at all. It simply uses a federally-imposed guideline of 50 percent minority enrollment as a breakpoint. (Tr. 624-28).

[14]Ex. 92, pp. 12-13.

ington's school districts at this time. While some or all of them may make sense in some contexts, they are absurd in others. This fact underscores the correctness of this Court's holding that no one of them is embodied as an unchangeable standard incorporated into the Fourteenth Amendment. And because of this, it is absurd to argue that Initiative 350 will have any impact on "desegregation" in Washington.

III. THE "OVERBREADTH" ISSUE:

The School Districts' claim of an affirmative constitutional duty to achieve greater racial balance has another facet which is especially important with respect to Seattle. While we have addressed this issue, with clarity we hope, in our opening brief, a few further thoughts seem warranted in light of appellees submissions.

On the issue of whether predecessor school boards in Seattle have committed acts of *de jure* segregation, the District is studiously ambivalent. (See SD Br. 4, note 3) It apparently wishes this Court to view it as being in precisely the same position as a school district which has been judicially determined to have committed such acts. At the same time, however, it apparently wishes to preserve the option of presenting a defense to any charges of *de jure* segregation in Phase II of this litigation, should that phase occur.

But if Seattle is to be viewed in the present phase of this litigation as being in the same position as a district which has been judicially determined to have committed such acts, then Seattle's case is actually moot. For such a school district is simply outside the scope of the Initiative, as we have previously shown.

To keep its challenge to the Initiative from becoming moot, however, the Seattle School District suggests that the Initiative prevents the District itself from determining that it has committed such acts, and therefore has a constitutional duty to adopt a remedy. (SD Br. 38-42)

The Office of the Attorney General does not so

construe the Initiative. (State Br. 37-40)[15] But how does a constitutional issue arise if that construction is wrong? And what practical difference does it make as to who is correct on this issue of statutory construction?

If the members of the Seattle School Board make a good faith determination that their predecessors have engaged in acts of *de jure* segregation, one result is certain. They may continue the Seattle Plan without fear of any lawsuit from the Attorney General or any state agency.

This does not mean that Seattle's determination is not subject to legal challenge. A student or parent remains free to sue the District and to obtain a judicial ruling that Seattle was wrong in its determination. But until that happens Seattle is entirely free to rely upon its good faith judgment that it must continue its policy of extra-neighborhood assignments.

We again note, however, that this whole discussion is entirely academic. Phase II of this litigation has been designed by the District Court to answer that very question, if necessary. Seattle need not speculate on who might sue them. They already know. The Seattle Intervenor-Plaintiffs already have.

The issue of the proper construction of § 6 is, in the final analysis, a "non-issue," which has interesting procedural aspects, but no constitutional significance.

CONCLUSION

It should now be clear to the Court that upholding the validity of Initiative 350 will result in no retreat whatsoever from any of this Court's prior desegregation

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[15]The so-called Seattle Intervenor-Plaintiffs' attempts to persuade the Court that our position on the false issue of overbreadth "lacks candor" itself lacks the truthfulness which a submission to this Court deserves.

They claim that we somehow declined to give a formal opinion on the question of what a school district may lawfully do under Initiative 350 to remedy *de jure* segregation, and thus ducked the question for purposes of this litigation. ACLU, et al., Br. pp. 51-57. An examination of the questions posed which were admitted as Ex. A-89 at trial shows clearly, however, that the Attorney General *was not even asked that question.*

cases. On the other hand, invalidation of Initiative 350 will result in an unwarranted extension of *Hunter v. Erickson*, and a retreat from the principles announced in *Washington v. Davis*, *Arlington Heights* and *Personnel Administrator of Massachusetts v. Feeney*.

Initiative 350 is remedial legislation, intended to restore the traditional neighborhood school policy in the State of Washington. It will not result in any "resegregation" of schools in the State of Washington.

Respectfully submitted,

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